

**STATE OF MICHIGAN
IN THE SUPREME COURT**

JOAN M. GLASS,

Plaintiff-Appellant,

v

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Defendants-Appellees.

Supreme Court Docket No. 126409

Court of Appeals Docket No. 242641

Alcona Circuit Court No. 01-10713-CK

**BRIEF OF AMICI CURIAE
NATIONAL WILDLIFE FEDERATION AND
MICHIGAN UNITED CONSERVATION CLUBS
IN SUPPORT OF PLAINTIFF-APPELLANT**

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STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT

STATEMENT OF QUESTION PRESENTED

STATEMENT OF FACTS

Amici Curiae National Wildlife Federation and Michigan United Conservation Clubs adopts the Plaintiff-Appellant's statement of basis of jurisdiction of the Supreme Court, statement of question presented, and statement of facts.

INTEREST OF AMICI CURIAE

National Wildlife Federation (“NWF”) is a nonprofit corporation organized and existing under the laws of the District of Columbia. NWF is the largest citizen-supported conservation advocacy and education organization in the United States, with affiliate organizations, members, and supporters across the nation, including Michigan. NWF works actively on behalf of its members to maintain and enhance the quality of the nation’s waters, including the waters of the Great Lakes and waters under Michigan’s jurisdiction. Maintaining public access to the waters of the Great Lakes is a priority for NWF and its members to continue our great outdoor heritage.

Michigan United Conservation Clubs (“MUCC”) is a Michigan nonprofit corporation. MUCC is a citizens' grassroots organization, with 500 autonomous clubs and over 100,000 individuals uniting for one overriding purpose – to promote the wise use and conservation of our natural resources. Starting in 1937, MUCC is a strong voice for conservation of Michigan’s natural resources. MUCC has won many impressive victories for conservation over the years. Its strength comes from the size and diversity of its membership and the quality of its leadership. MUCC builds an environmentally literate citizenry through the publication of a monthly magazine, a weekly television program, a website, an electronic policy newsletter, a summer camp for kids, wildlife encounter programs, and a magazine targeted at late elementary children.

While this case arose as a dispute between two neighbors, it will likely set new precedent for rules of ownership and access to exposed Great Lakes bottomlands in Michigan. NWF, MUCC, and their thousands of members in Michigan are committed to maintaining full public access to the Great Lakes and their shorelines.

INTRODUCTION AND SUMMARY OF ARGUMENT

The waters of the Great Lakes, and the bottomlands beneath those waters, are a fundamental public trust resource, owned by the state for the benefit of its citizens. *See generally Illinois Central R. Co. v Illinois*, 146 US 387 (1892); *see also Peterman v. Dept. of Natural Resources*, 446 Mich 177, 194, 521 NW2d 499 (1994); *Nedtweg v. Wallace*, 237 Mich 14, 16-17, 208 NW 51 (1926). The public trust bottomlands extend to the ordinary high water mark (“OHW”) of the Great Lakes. *See Id.*

Scientific study established that the OHW for Lake Huron is 579.8 feet above sea level. The Michigan Legislature accordingly set that elevation as the OHW for Lake Huron in the Great Lakes Submerged Land Act (“GLSLA”). *See MCL 324.32502*. Water levels in the Great Lakes have a natural and cyclical fluctuation, and at the present time the observed water level of Lake Huron is below 579.8 feet. As a result, some Great Lakes bottomlands below the OHW have been exposed. The public has a right of recreational access to this resource pursuant to the public trust doctrine, just as it does to all other Great Lakes bottomlands and the Great Lakes themselves.

The Court of Appeals held that the Defendant-Appellee landowners have an “exclusive right of access” to the temporarily and seasonally exposed bottomlands below the OHW down to the water’s edge, in effect excluding the public from this public trust resource. However, the Court of Appeals based its holding on a misinterpretation of this Court’s decision in *Hilt v. Weber*, 252 Mich 198, 233 NW 159 (1930). *Hilt* addressed the property rights associated with surveyed meander lines and common law rights acquired by accretions occurring through reliction, none of which are at issue in this case. Instead, this case concerns the rights to lands below the OHW, which belong to the public.

I. THE GREAT LAKES BOTTOMLANDS ARE PROTECTED AS A PUBLIC TRUST RESOURCE.

The public trust doctrine, placing Great Lakes bottomlands (and Great Lakes water itself) in trust with the state, was most famously explained by the United States Supreme Court in *Illinois Central R. Co. v. Illinois*, 146 US 387, 452, 13 SCt 110; 36 LEd 1018 (1892):

That the state holds title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.

That the State of Michigan holds in trust Great Lakes bottomlands within its borders for the benefit of the public is without doubt. See *Peterman v. Dept. of Natural Resources*, 446 Mich 177, 194, 521 NW2d 499 (1994); *Nedtweg v. Wallace*, 237 Mich 14, 16-17, 208 NW 51 (1926).

As discussed in the following section, the boundaries of the Great Lakes bottomlands are their respective ordinary high water marks (OHW), which have been set forth in statute in Michigan (in the Great Lakes Submerged Lands Act) based on scientific data. Below the OHW, the public trust doctrine protects the right of public access and recreation, including beachwalking along the shoreline.

II. THE PUBLIC TRUST BOTTOMLANDS IN MICHIGAN EXTEND TO THE ORDINARY HIGH WATER MARK.

Although the Court of Appeals recognized the public trust in Great Lakes bottomlands extending to the ordinary high water mark (OHW) pursuant to statutory and common law, it misapplied this Court's decision in *Hilt v. Weber*, 252 Mich 198, 233 NW 159 (1930) leading it to improperly abridge the public's right to bottomlands exposed by the constantly changing water's edge.

In the Great Lakes Submerged Land Act (GLSLA), MCL 324.32501 *et seq.*, the State of Michigan statutorily delineated the OHW boundary of the Great Lakes bottomlands based on scientific study. GLSLA's delineation of the OHW boundary of Great Lakes bottomlands was consistent with the longstanding rule that the states' title under the public trust doctrine extends to the high water mark of the Great Lakes.

Originally passed in 1955, GLSLA provided a statutory declaration that the state protects the public's interest in the Great Lakes bottomlands:

The lands covered and affected by this part are all of the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes, belonging to the state or held in trust by it, including those lands that have been artificially filled in. The waters covered and affected by this part are all of the waters of the Great Lakes within the boundaries of the state. This part shall be construed so as to preserve and protect the interests of the general public in the lands and waters described in this section, to provide for the sale, lease, exchange, or other disposition of unpatented lands and the private or public use of waters over patented and unpatented lands, and to permit the filling in of patented submerged lands whenever it is determined by the department that the private or public use of those lands and waters will not substantially affect the public use of those lands and waters for hunting, fishing, swimming, pleasure boating, or navigation or that the public trust in the state will not be impaired by those agreements for use, sales, lease, or other disposition.

MCL 324.32502.

In 1968, the Michigan Legislature amended GLSLA to clarify the OHW boundary of the bottomlands:

The word “land” or “lands” as used in this part refers to the aforesaid described unpatented lake bottomlands and unpatented made lands and patented lands in the Great Lakes and the bays and harbors of the Great Lakes lying *below and lakewards of the natural ordinary high-water mark*, but this part does not affect property rights secured by virtue of a swamp land grant or rights acquired by accretions occurring through natural means or reliction. For purposes of this part, the ordinary high-water mark shall be at the following elevations above sea level, international Great Lakes datum of 1955: Lake Superior, 601.5 feet; *Lakes Michigan and Huron*, 579.8 feet; Lake St. Clair, 574.7 feet; and Lake Erie, 571.6 feet.

MCL 324.32502 (emphasis added).

When the Legislature amended GLSLA in 1968 and set the Lake Huron OHW at 579.8 feet, it did not do so politically or arbitrarily. Rather, it relied on the International Great Lakes Datum (IGLD) of 1955, setting out the elevation of the high water mark for each lake. The IGLD, found in MCL 324.32502, is an official measurement of mean Great Lakes water levels to which the governments of the United States and Canada subscribe, based on data collected from water level gages throughout the Great Lakes.

In passing and amending GLSLA, the Legislature thus drew the proverbial “line in the sand” for the boundary of protected Great Lakes bottomlands at 579.8 feet above sea level for Lakes Michigan and Huron.¹ The statute has thus provided over thirty-five years of certainty both for property owners and the public. The Court of Appeals opinion would reinstate the past, vague “moveable freehold” that prevailed in the absence of scientific information and the Legislature’s delineation of the boundary of bottomlands protection.

Although the Court of Appeals recognized the OHW boundary provided under GLSLA, it misconstrued the statute's reservation of "property rights . . . acquired by accretions occurring through natural means or reliction." MCL 324.32502. The 1968 GLSLA amendments expressly preserved common law property rights "acquired by accretions occurring through natural means or reliction." *Id.* However, the shoreline at issue in this case is not the result of accretions and reliction, but rather seasonally and cyclical fluctuations of water levels below the OHW.

Accretions formed by reliction acquire property rights that do not attach to land exposed by the cyclical back and forth action of the water with respect to the OHW. The United States Supreme Court set forth this concept in *Jefferis v East Omaha Land Co*, 134 US 178 (1890), when it addressed ownership of dry upland on the Missouri River which was formed by accretion over a 17-year period. The Court in *Jefferis* defined accretion as "an addition to land conterminous with the water, which is formed so slowly that its progress cannot be perceived." *Id.* at 193. In *Jefferis*, accreted land was "formed by natural causes and imperceptible degrees" over the period from 1853 to 1870, so slowly that it could not be observed in progress, and "the new land so formed became high and dry, above *the usual highwater mark*." *Id.* at 181-182 (emphasis added). The Court held that the thus-accreted land belonged to the adjoining riparian owner under the common law rule of accretion and reliction. The Court's discussion of accreted land as land above the "usual [ordinary] highwater mark," *Id.*, makes clear that accretion through reliction relates to land other than lands below the OHW.

¹ The Legislature can not limit the public trust by statute, so the GLSLA elevation can only be viewed as a minimum boundary of public trust bottomlands.

In this case, the exposed bottomlands are not the result of slowly formed land created by a gradual retreat of Great Lakes water. Rather, the lands are part of the shoreline that are covered with water and exposed on a seasonal and cyclical basis. The lands are not the result of “accretions occurring through natural means or reliction,” and GLSLA’s reservation of property rights does not apply.

III. THE COURT OF APPEALS MISAPPLIED THIS COURT’S DECISION IN *HILT v. WEBER* TO EXCLUDE PUBLIC ACCESS FOR BEACHWALKING.

The Court of Appeals held that the Defendant-Appellee landowners have an “exclusive right of access” to the temporarily and seasonally exposed bottomlands below the OHW down to the water’s edge, in effect excluding the public from this public trust resource. This holding was based on a misapplication of this Court’s decision in *Hilt v. Weber*, 252 Mich 198, 233 NW 159 (1930).

The *Hilt* decision overturned a series of earlier cases (the “*Kavanaugh* cases”) that gave to the state ownership of all land below the “meander line,” which was historically drawn well above the ordinary high water mark (OHW). The Court made clear that its decision pertained only to accreted land above the high water mark: “Lest we be misled, we must keep it clear that the issue . . . covers only dry land, extending meandered upland by gradual and imperceptible accession or recession of the water, on the lake side of the meander line.” *Id.*, 252 Mich at 198. Thus, the *Hilt* decision addressed property rights resulting from accreted dry upland above the OHW, not access to land below the OHW. Neither the historic meander lines nor lands formed by reliction are at issue in this case. Instead, this case concerns bottomland below the OHW.

The Michigan Attorney General also misinterpreted this Court's decision in *Hilt* in its 1978 Opinion regarding access to Great Lakes shoreline. See 1977-1978 OAG No. 5327. The Attorney General Opinion first recognized that GLSLA "indicates that the dividing line between the upland and the submerged land is the ordinary high water mark," and that the riparian ownership extends down to this line. 1977-1978 OAG No. 5327 at 2. The Attorney General Opinion used this authority to determine that "[t]hus, the owner cannot extend structures into the space between low and high-water mark, without consent of the State." *Id.*

However, in addressing the rights of beachwalking and recreational access below the OHW, the Attorney General Opinion misconstrued dicta in *Hilt* to find in Michigan a right of exclusive access for the adjacent landowner. The Attorney General Opinion cited the following passage from *Hilt*: "And it has been held that the public has no right of passage over dry land between low and high water mark but the exclusive use is in the riparian owner." *Id.*, citing *Hilt*, 252 Mich at 226.

However, the cited passage was dicta referring to a Wisconsin case, *Doemel v. Jantz*, 180 Wis 225, 193 NW 393 (1923). *Doemel* does not even apply to Great Lakes shorelines; rather, it is an inland lake case regarding Lake Winnebago in Wisconsin. The riparian rules for inland lakes are different from those for the Great Lakes in every state, including Michigan.

Rather than looking to the *Doemel* case, which pertains to inland lakes, this Court should look to recent decisions for guidance on the extent of the public trust in Great Lakes shorelines and bottomlands. Since the *Doemel* decision in 1923, the Wisconsin Supreme Court has taken a more modern view of the public trust doctrine:

Although the public trust doctrine was originally designed to protect commercial navigation, the doctrine has been expanded to safeguard the public's use of navigable waters for enjoyment of scenic beauty, as well as for recreational and nonpecuniary purposes.

Gillen v City of Neenah, 219 Wis2d 806, 580 NW2d 628, 633 (1998).

The New Jersey Supreme Court has specifically interpreted the public trust doctrine as protecting the public's right to use the shoreline for recreation:

The public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people. The public's right to use the tidal lands and water encompasses navigation, fishing and recreational uses, including bathing, swimming and other shore activities.

Borough of Neptune City v Borough of Avon-by-the-Sea, 61 NJ 296, 294 A2d 47 (1972).

CONCLUSION

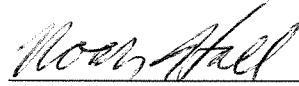
The Court of Appeals erroneously took a fundamental public trust resource – the Great Lakes shoreline and bottomlands – and put it under the exclusive use of the Defendant-Appellee landowner. In reaching this decision, the Court of Appeals disregarded public trust holdings both by the United States Supreme Court and this Court, misapplied this Court's holding in *Hilt v. Weber*, and ignored the scientifically-based GLSLA enacted by the Michigan Legislature. The Court of Appeals ruling would replace the certainty and balancing of interests represented by the Great Lakes Submerged Lands Act with a new rule that essentially requires beachwalkers to walk in the water, even if only a quarter of an inch deep. The Court of Appeals ruling creates a taking – a taking of the public trust – and a gift to select property owners of a benefit that was never purchased.

RELIEF REQUESTED

For the reasons set forth herein, the Amici respectfully request that this Court reverse the decision of the Court of Appeals and enter judgment for Plaintiff-Appellant with the relief requested by Plaintiff-Appellant.

Respectfully submitted,

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